



Republican Policy Committee

Larry E. Craig, Chairman Jade West, Staff Director 347 Russell Senate Office Building (202)224-2946 <http://www.senate.gov/~rpc/>

September 4, 1996

Why ENDA Doesn't Belong on DOMA

Senator Kennedy has introduced the Employment Non-Discrimination Act (ENDA) as an amendment to H.R. 3396, the Defense of Marriage Act (DOMA).

DOMA does just two things: First, it defines — for purposes of Federal law only — the words “marriage” and “spouse,” and second, it makes clear that a State can decide for itself whether it will “give effect to any public act, record, or judicial proceeding” of another State “respecting a relationship between persons of the same sex that is treated as a marriage.”

ENDA would amend federal civil rights laws to prohibit discrimination in employment on the basis of sexual orientation.

ENDA doesn't belong on DOMA:

- The Employment Non-Discrimination Act is *unrelated* to the Defense of Marriage Act, an act which seeks to defend marriage and to protect State prerogatives with respect to marriage. **Frankly, ENDA is an attempt to kill DOMA.**
- ENDA is a *power grab*. ENDA gives the EEOC, the Attorney General, and the Federal courts power to impose fines and issue decrees having to do with sexual orientation, but this is exactly the kind of inside-the-Beltway power play that Americans have come to resent.
- In a *Newsweek* magazine poll conducted in May of this year, when asked about the effort the country has already made “to protect the rights of gays and lesbians,” 26 percent said the country had made the right amount of effort, 27 percent said more effort is needed, but 40 percent said the effort had gone too far. In short, *two-thirds of the country says “Stop!”*
- Eight-four percent of the *Newsweek* respondents did say there should be “equal rights for gays in terms of job opportunities,” but only 41 percent agreed that there should be “special legislation to guarantee equal rights for gays” while 52 percent said there should not be such legislation. In sum, *Americans favor fairness but they oppose the heavy hand of government* which is what ENDA represents.
- Many Americans may not realize that under federal employment laws *as now written, every heterosexual, homosexual, or bisexual person is treated equally.*

Again, Andrew Sullivan is helpful: "[M]any of the [sexual orientation] statutes concede that the law contains an approval of homosexual behavior, which is why they exempt, in most cases, churches and religious institutions from such strictures. But in a liberal society, the right not to have the state impose a certain morality is not merely the province of institutions; it is the right of citizens." *Virtually Normal* at 161-62 (1995).

■ ***ENDA will breed litigation (nothing new there) and confusion in law and morals.*** ENDA forbids discrimination "on the basis of sexual orientation" which it defines to mean "homosexuality, bisexuality, or heterosexuality, whether such orientation is real or perceived." Frankly, no one knows what those words mean or how they will be applied in many real-life situations. Suppose, for example, that an employer thinks adultery reflects poorly on the character of an employee being considered for a promotion. Under ENDA, could the employer take the adultery into account? What if the adulterous partner is of the same sex as the employee? Keep in mind, too, that the word "bisexuality" denotes more than one sexual partner. Bisexuality and monogamy are incompatible.

We ought to remember scholar Gertrude Himmelfarb's warning that "Individuals, families, churches, and communities cannot operate in isolation, cannot long maintain values at odds with those legitimated by the state and popularized by the culture. . . . Values, even traditional values, require legitimation. At the very least, they require not to be illegitimated. And in a secular society, legitimation or illegitimation is in the hands of the dominant culture, the state, and the courts." G. Himmelfarb, *The De-Moralization of Society* 247-48 (1995).

■ ***ENDA threatens to make sexuality an issue where it has never been an issue before.*** Currently, most employers don't know about their employees' "sexual orientation" and don't care. ENDA will help put an end to that. Some employers do care, and ENDA will put an end to that, too. ENDA is about sexuality, but it is not about privacy. ENDA is about going public.

■ ***Unlike some protected classes, homosexuals are not disadvantaged in the marketplace.*** There is disagreement about their income levels, but it has been reported that the average household income of homosexuals is \$47,000 a year, which is 12 percent higher than the average American's. [Source: D. Harris, "Out of the closet and into never-never land," *Harper's Magazine*, vol. 291, p. 52 (Dec. 1995).] Even this figure may vastly *understate* the wealth of homosexuals (because their households are smaller than average). "The average income for gay individuals is \$36,000 per capita yearly versus \$12,287 for the overall population." [Source: K. Kovach, "ENDA promises to ban employment discrimination for gays," *Personnel Journal*, vol. 74, p. 48 (Aug. 1995).] As for status in the marketplace, "Forty-nine percent of homosexuals hold managerial or professional positions compared with 18% for the general population." [*Id.*]

Staff Contact: Lincoln Oliphant, 224-2946